

Decision **DRAFT DECISION OF ALJ GRAU** (Mailed 4/6/2004)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Raw Bandwidth Communications, Inc.,

Complainant,

vs.

SBC California, Inc. (U 1001 C) and SBC
Advanced Solutions, Inc., (U 6346),

Defendants.

Case 03-05-023
(Filed May 15, 2003)

OPINION RESOLVING COMPLAINT

I. Summary

In today's decision, we find that Pacific Bell Telephone Company (SBC California)¹ and SBC Advanced Solutions, Inc. (SBC ASI) do not unreasonably discriminate against Raw Bandwidth Communications, Inc. (Raw Bandwidth) or otherwise violate applicable law by certain of Defendants' practices as they affect Digital Subscriber Line (DSL) services.

Specifically, this complaint concerns the situation in which the telephone subscriber receives basic service from one carrier (here, Defendant

¹ Although the complaint named SBC California, Inc. as a defendant, the correct name for the legal entity is Pacific Bell Telephone Company, which also does business as SBC California.

SBC California) and DSL service from an Internet Service Provider (ISP) that is unaffiliated with the carrier providing basic service. The Complainant and Defendants have managed to settle many of the problems underlying the original complaint. Two problems remain and are before us today.

The first problem arises when the carrier providing basic service terminates that service to the subscriber for nonpayment. Our rules require advance notice to the subscriber before termination. Raw Bandwidth argues that the carrier providing basic service must give substantially the same advance notice to the DSL carrier, which effectively will no longer be able to provide DSL service upon termination of the subscriber's basic service.² The assigned ALJ granted the Defendants' motion to dismiss the complaint insofar as it seeks to impose this additional notice requirement, and Raw Bandwidth has appealed the ALJ's ruling. We affirm the dismissal, albeit our reasoning differs slightly from that of the ruling, but we direct Defendants to negotiate this notice requirement with Raw Bandwidth.

The second problem (the alleged unreasonable discrimination) arises when the subscriber calls repair for a question or difficulty with DSL service. Often, the subscriber calls the carrier providing basic service, but in this situation, responding to the question or difficulty generally will be the responsibility of the ISP, to whom, consequently, the subscriber is referred. The manner of the referral is the crux of the complaint in this regard. The Defendants currently enable the subscriber to be connected without redialing to the service

² Raw Bandwidth purchases DSL Transport from SBC ASI using a line sharing arrangement. When voice service is disconnected by SBC California, line sharing no longer is viable.

department of the ISP when the ISP is an affiliate of Defendant SBC California. (In other words, the subscriber does not have to hang up and call the affiliated ISP directly). Raw Bandwidth, which is an unaffiliated ISP, wants SBC California to do substantially the same thing for Raw Bandwidth's subscriber, *i.e.*, to offer to automatically connect those subscribers to Raw Bandwidth's service department whenever they call dial 611 with a DSL question or difficulty. We hold that, in this situation, differential treatment of subscribers is lawful; in other words, the fact that a subscriber to Raw Bandwidth's DSL service must hang up and call Raw Bandwidth's service department directly does not violate applicable state or federal law.

II. Procedural Background

We held a prehearing conference (PHC) on August 23, 2003, to establish the scope of this proceeding and set a hearing schedule. Both prior and subsequent to the PHC the parties had settlement discussions and resolved many issues.³

On June 30, 2003, Defendants filed a motion to dismiss the complaint, which Raw Bandwidth opposed. On July 8, 2003, Complainant filed a request for withdrawal of issues concerning listing ISPs on the SBC.com web page. On September 11, 2003, the Assigned Commissioner Ruling's (ACR) and scoping memo granted the unopposed request of Raw Bandwidth to withdraw

³ Raw Bandwidth and Defendants settled Raw Bandwidth's allegation that Defendants unreasonably failed to warn customers who failed to pay basic service charges that their DSL also would be disconnected. Directly educating the end user (either by Raw Bandwidth, Defendants or both) most efficiently resolves Raw Bandwidth's underlying concern, that subscribers inadvertently will permit the disconnection of their voice line for nonpayment while believing that their DSL service will continue uninterrupted.

two counts of the Complaint. The ACR also partially granted Defendants' motion to dismiss part of Raw Bandwidth's complaint, specifically, the allegation that Defendants unreasonably disconnected DSL Transport whenever Defendants disconnected a customer's voice line service for nonpayment. The ACR noted that the relief Raw Bandwidth requested, *i.e.*, advance notice of disconnection, raised privacy concerns. The ACR granted Raw Bandwidth leave to amend the complaint on that issue.

Raw Bandwidth filed its First Amended Complaint on September 22, 2003. On October 23, 2003, Defendants filed a joint motion to dismiss and to strike portions of the amended complaint. On October 31, 2003, the parties reported that they anticipated resolving remaining issues with the exception of the 611 transfer issue and the disconnection issue subject to the motion to dismiss. On November 7, 2003, Complainant filed a response opposing the motion to dismiss.

On October 10, 2003, Raw Bandwidth's attorney sent an email message to request that the hearings scheduled for October 15 be taken off calendar and that the matter be submitted on briefs, because the parties had settled two of the three remaining issues.⁴ The assigned administrative law judge (ALJ) granted the request to take the hearings off calendar and concurred with the filing of opening briefs on November 10 and reply briefs on November 25, 2003. Both parties submitted opening and reply briefs.

⁴ Raw Bandwidth has not formally withdrawn the two issues concerning relief to which Complainant was entitled for matters settled by the parties. We will accept the parties' October 31, 2003 update stating those issues would be resolved.

By December 22, 2003 ALJ Ruling, the motion to dismiss portions of the amended complaint was granted, because the relief requested (regarding disconnection of DSL Transport) would violate the settlement agreement between the California ISP Association, SBC California, and SBC ASI adopted in Decision (D.) 03-07-032.

In sum, the parties were able to resolve among themselves several matters from the original complaint; those matters are not discussed further. The issues before us today are (1) the request by Raw Bandwidth to reconsider the ALJ Ruling dismissing parts of the amended complaint, and (2) the discrimination issue, which was submitted on briefs. As discussed in sequence below, we affirm the dismissal and deny relief on the discrimination issue.

III. Motion for Reconsideration of December 22, 2003 ALJ Ruling

Raw Bandwidth requests reconsideration of the ALJ Ruling dismissing portions of the amended complaint. Raw Bandwidth alleges the ruling is not supported by the record, and it disagrees with the ruling's conclusion that we cannot grant the relief requested by Raw Bandwidth, *i.e.*, advance notification of disconnection. Defendants support the ruling and assert Raw Bandwidth mostly reargues its position opposing Defendants' motion to dismiss.

We affirm the ruling's conclusion that SBC ASI need not provide DSL Transport if SBC California disconnects the underlying voice service. (In practice, DSL Transport remains connected for five days after voice service has been disconnected.) DSL Transport is a detariffed service offering subject to conditions mandated by the Federal Communications Commission (FCC).

(Memorandum Opinion and Order, *In the Matter of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 17 Fcc Rcd 27000 (2002), ¶

1.) Under SBC ASI's general services agreement, which provides that DSL

Transport is offered via a line sharing arrangement, the line cannot be shared and DSL Transport no longer is offered once the voice line is disconnected.⁵ (Ruling, pp. 2-3.) Thus, disconnection of DSL Transport when the voice line is disconnected does not violate the terms under which DSL Transport is offered, nor does disconnection under these circumstances violate any law or order of this Commission.

There also is no statute or Commission order that bars disconnection of non-basic services for nonpayment of basic service charges. DSL, and by extension, DSL Transport, is not a basic service under Commission rules and can be disconnected if a subscriber fails to pay basic service charges. (*See Campbell v. Pacific Bell Telephone Co.*, D.02-06-011, 2002 Cal. PUC LEXIS 391, **9-10.)⁶

There is also no statute or Commission order that requires a lengthy notice to the ISP in advance of voice line disconnection. Specifically, Defendants' practice is that five days after dial tone has been suspended for nonpayment of basic service charges, Defendants notify the ISP, either its affiliated ISP or an unaffiliated ISP, that DSL Transport is being disconnected and disconnect the line. Raw Bandwidth contends that Defendants must give 30 days' written notice before DSL Transport can be disconnected, because SBC ASI's general services agreement with the ISP provides that SBC ASI only may discontinue

⁵ "Company's [SBC ASI] DSL Transport is offered via a line sharing arrangement (High Frequency Portion of the Line-HFPL) over an SBC ILEC-provided (non-resold, non-UNE-Platform) retail POTS line." (SBC ASI's General Terms & Conditions, section 6.2.2.)

⁶ However, as discussed *infra*, DSL Transport is a basic service under the FCC's Computer III rules.

DSL Transport on 30 days' written notice.⁷ However, the 30-day notice referenced by Raw Bandwidth applies to the notice SBC ASI must provide if its DSL Transport customer (that is, the ISP) does not comply with the agreement. That notice does not apply to the circumstance contemplated here, the disconnection of the SBC California subscriber for nonpayment of its basic service charges and the resulting disconnection of DSL service. Thus we determine that SBC ASI's notice practice does not violate its general services agreement by notifying its DSL Transport customer only after dial tone already has been suspended and when the DSL portion of the phone line has been or is about to be disconnected.

Raw Bandwidth argues that failure to warn it in advance of disconnection of DSL Transport is unreasonable and presents problems, *e.g.*, because notice of voice disconnection sometimes is sent to the wrong address and ISPs have no opportunity to contact their subscriber to warn that subscriber of the disconnection of DSL. We reject this argument. SBC California, like any provider of basic service, must give proper notice to its subscriber before disconnecting the subscriber's basic service. The subscriber's ISP is a third party who has some interest in the disconnection of that service but who does not thereby become entitled to the same advance notice given the subscriber. Although the subscriber's ISP has no right to the disconnection notice sent to the voice service subscriber, public policy considerations entitle the DSL Transport

⁷ "Company [SBC ASI] may refuse additional applications for Service or discontinue the provision of Services as set forth below if a Customer fails to comply with these Terms and Conditions ("Non-complying Customer"). On thirty (30) calendar days written notice to the person designated by that customer to receive such notices of noncompliance, Company may . . ." (General Terms & Conditions, Section 2.8.1.)

customer (the ISP) to reasonable advance notice of the pending disconnection of DSL Transport service. DSL Transport continues five days after voice service is disconnected. During that period, the issue is advance notice of DSL Transport disconnection, not voice disconnection, and the privacy protections afforded the voice subscriber for disconnection of voice service no longer apply. .

Of further concern is Raw Bandwidth's contention that Defendants refuse to negotiate these terms of the general services agreement with Raw Bandwidth. In the FCC's "forbearance from tariff regulation" proceeding, SBC Communications, Inc. (SBC) committed to publishing "general rates, terms, and conditions for ISP broadband access arrangements that unaffiliated ISPs can either opt into or use as the starting point for negotiating alternative rates, terms, and conditions." (Memorandum Opinion and Order, supra, at ¶ 11.) The FCC relied on those commitments in finding that "forbearance from tariff regulation" criteria were met. (*Id.* at ¶ 13.) The failure to negotiate specific terms would violate the commitment that ISPs can negotiate alternate terms. Thus, we conclude Defendants must negotiate these terms with Raw Bandwidth. Among the terms that are subject to negotiation, are terms relating to notice to the ISP in the circumstances we have been discussing.

Raw Bandwidth maintains that the ALJ Ruling did not apply the appropriate standard in determining that portions of the first amended complaint should be dismissed. Raw Bandwidth is correct that the standard for dismissing complaints or portions thereof is the summary judgment standard and that the moving party must prevail based solely on undisputed facts and matters of law. The ruling determined that Raw Bandwidth's proposal to permit subscribers to waive privacy concerns to enable Raw Bandwidth to receive advance notice of disconnection was contrary to the settlement agreement we

approved in D.03-07-032. That settlement agreement precludes SBC California, when acting on behalf of its affiliated ISP, from being able to identify which unaffiliated ISP is the provider. Raw Bandwidth asserts that relaying information from SBC California to SBC ASI could be a means of providing advance notice to the ISP that would not violate the settlement agreement. If true, that procedure could resolve these legal concerns. Because we determine that the failure to give advance notice to the ISP does not violate statute or Commission order, we need not weigh the legality or merits of Raw Bandwidth's alternate advance notice proposal. However, we direct Defendants to negotiate with Raw Bandwidth to determine the feasibility of this or alternate proposals to satisfy the public policy concern of advance notice of DSL Transport disconnection after the voice service has been disconnected.

IV. Discrimination Issue

The parties stipulated to the relevant facts concerning the connection to the ISP for DSL repair services. If a caller dials 611 from an SBC California telephone line, the caller receives various Interactive Voice Response System (IVR) prompts, including entering the caller's telephone number. If the telephone number is for a line that has DSL Transport Service, the next prompt states: "Our records indicate that your voice line includes DSL service. If you are reporting trouble on the data portion of your line, press 1" If the caller presses 1, the next prompt states, " If you are calling about your DSL: Internet access service from SBC Internet Services, press 1 now. Otherwise, if you are calling about DSL Internet access service from another Internet service provider, please hang up and call your Internet service provider." If the caller presses 1, IVR will connect the caller to SBCIS' IVR.

SBC California connects over 10,000 calls each month from its 611 IVR to SBCIS. SBC California does not offer such a connection from its 611 IVR to any other ISP. The issue is whether Defendants unreasonably discriminate by providing subscribers of their affiliated ISP, SBCIS, who dial 611 for DSL repair services the option of connecting to SBCIS without having to hang up, but telling unaffiliated ISPs' subscribers they must hang up and call their ISP.

As a practical matter, both SBCIS and unaffiliated ISPs have numbers for subscribers to access DSL repair services other than 611. However, a significant number of subscribers do call 611 for repair services, and a significant number are connected to SBCIS. We hold that this differential treatment is lawful, because as we discuss below, the fact that Raw Bandwidth's DSL service subscriber must hang up and call Raw Bandwidth's service department does not violate applicable state or federal law.

**A. SBC California's Differential Treatment
of Customers Making 611 Calls Does
Not Violate FCC Requirements**

The parties agree that the FCC's Computer III rules govern SBC California's obligations regarding enhanced services, and that the rules require SBC California provide unaffiliated ISPs nondiscriminatory access to the same services and functions underlying the provision of enhanced services to its affiliated ISP. The parties also agree that there is no explicit federal requirement that SBC California automatically connect to their ISP those customers of unaffiliated ISPs who dial 611. We determine that no other federal requirement can reasonably be interpreted to require such a connection.

The connection of 611 repair calls is neither a basic service, nor a basic service function, nor a network capability that is subject to the FCC's Computer III unbundling and tariff requirements.⁸ The FCC's Computer III Order does not explicitly require SBC California to make no distinction between 611 repair calls concerning unaffiliated ISPs and those calls concerning its own ISP. The FCC's focus in the computer inquiry proceedings is on the distinction between regulated basic services and unregulated enhanced services, with telephone service a basic service and Internet access service an enhanced service. Carriers that provide enhanced services must provide access to the basic transmission facilities used to provide enhanced services under the same terms and conditions enjoyed by their own enhanced services affiliate. Those carriers are subject to nonstructural safeguards—Open Network Architecture, unbundling and equal access to basic network functions, and Comparably Efficient Interconnection (CEI), in addition to cost accounting rules. (*See generally Amendment of Sections 64.702 of the Commission Rules and Regulations (Third Computer Inquiry)*, 104 FCC 2d 958 (1986).)

Raw Bandwidth contends that the handling of repair calls is subject CEI, and specifically to the unbundling of basic services requirement. That requirement provides:

⁸ The ACR determined that the N11 Order, which requires the transfer of local exchange customers to their own carriers when using 611, does not apply to ISPs. (First Report and Order, *In the Matter of the Use of N11 Codes and Other Abbreviated Dialing Arrangements*, 12 FCC Rcd 5572 (1997) ¶ 46; ACR, p. 4.) We affirm that determination and further determine that the N11 Order's provision permitting customers to access or activate an enhanced service when the incumbent local exchange carrier uses N11 to do so does not apply to ISPs.

As part of its CEI offering, the basic services and basic service functions that underlie the carrier's enhanced service offering must be unbundled from other basic service offerings and associated with a specific rate element in the CEI tariff. . . . Moreover, any options that are available to a carrier in the provision of such services or functions also must be included in the unbundled offerings. All basic network capabilities utilized by the carrier's enhanced service offerings, including signaling, switching, billing and network management, are subject to this unbundling requirement. (*Id.* at ¶ 158.)

Defendants contend that the FCC intended that basic service refer to the transmission that carriers use as input into their enhanced services. By definition, a basic service underlies the carrier's enhanced service offering; therefore, DSL Transport is a basic service that underlies SBCIS' broadband Internet service offering.

However, the handling of repair calls is incidental to SBC's provision of enhanced services and is outside the scope of the FCC's CEI requirements. Thus, the handling of repair calls does not constitute a basic service and is not subject to the CEI unbundling of basic service requirement. SBC notes that under the Computer III Order, it can use the same personnel to repair and install the equipment necessary to provide basic and enhanced services. (*Id.* at ¶ 100.) Therefore, the differing connection parameters for affiliated and unaffiliated ISP customers do not violate FCC requirements.

Complainant states that SBC California neither has a CEI offering for access to 611 nor tariffs for 611 Repair Transfer Service for unaffiliated ISPs. Complainant states the CEI end-user access requirement compels SBC to provide customers of unaffiliated ISPs access to 611. That access requirement provides:

If a carrier offers end-users the ability to use abbreviated dialing or signaling to activate or access the carrier's

enhanced offerings, it must provide, as part of its CEI offering the same capabilities to end-users of all enhanced services that utilize the carrier's facilities. (*Id.* at ¶ 162.)

SBC responds that it is not required to have a CEI offering because it is not providing access to 611; it merely is making a referral. SBC does not offer abbreviated dialing to activate service nor does it offer abbreviated dialing to directly access SBCIS' offerings. Instead, a subscriber who dials 611 for DSL repair must navigate a series of IVR prompts that could result in a transfer of the caller to SBCIS.

The FCC's end-user access requirement does not require a CEI offering for repair transfers. Because there is no explicit requirement and because an IVR transfer differs from direct access to SBCIS' services, we decline to find one here. In addition, as noted by Defendants, the relief requested by Raw Bandwidth, the transfer of calls to unaffiliated ISPs, could conflict with existing protocols. Competitive Local Exchange Carriers (CLECs) using unaffiliated ISPs could have calls transferred to that ISP, rather than the CLEC, as is currently required by FCC orders.

B. The Transfer of 611 Calls Does Not Raise Competitive Concerns

The inadvertent transfer of unaffiliated ISPs' subscribers' DSL repair calls to SBCIS does not raise competitive concerns. Raw Bandwidth contends the transfer of those calls amounts to "unfair competition," because SBC California's 611 IVR could transfer both SBCIS' and unaffiliated ISP's subscribers but does not, and SBCIS could use the transfer opportunity to market its own DSL service. Defendants respond that SBC California only offers to transfer SBCIS subscribers, not unaffiliated ISP's subscribers, and that Raw Bandwidth has the means to avoid such transfers, since its CEO, Michael Durkin, sometimes instructs

Raw Bandwidth's subscribers to contact SBC California when they experience both voice and data problems. We concur that Raw Bandwidth can educate its subscribers to contact it directly for repair concerns.

We also have provided parameters for marketing to customers who contact SBC California with repair issues. Specifically, in D.00-05-021, approving SBC ASI's application for a certificate of public convenience and necessity, we required Pacific Bell Telephone Company, doing business as SBC California, to address customer's inquiries prior to marketing SBC ASI's services. (*Re SBC Advanced Solutions, Inc.*, 2000 Cal. PUC LEXIS 317, Finding of Fact 3, Conclusion of Law 5.) If a customer with a DSL problem dials SBC California's 611 and inadvertently reaches an SBCIS representative after navigating SBC California's and SBCIS' IVR, SBC California has not addressed that customer's repair concern and no marketing of SBCIS' DSL services should take place.

V. Comments on Draft Decision

We initially categorized this proceeding as an adjudication that would go to hearing. We adhere to that category but find, with the agreement of the parties, that a hearing is not needed.

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on _____, and reply comments were filed on _____.

VI. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Janice Grau is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. SBC ASI's General Terms & Conditions for DSL Transport require that DSL Transport be offered via a line sharing arrangement. DSL Transport no longer is offered once the voice line is disconnected. Defendants' practice is that five days after dial tone has been suspended for nonpayment of basic service charges, Defendants notify the ISP, either its affiliated ISP or an unaffiliated ISP, that DSL Transport is being disconnected and disconnect the line.

2. SBC Communications, Inc. committed to negotiate alternative rates, terms, and conditions with unaffiliated ISPs for broadband access arrangements.

3. SBC California transfers over 10,000 calls per month from its 611 IVR to its affiliated ISP, SBCIS.

4. SBC California does not transfer calls from its 611 IVR to unaffiliated ISPs.

5. If an SBCIS subscriber with a DSL repair problem dials 611 from an SBC California telephone line, the caller receives an IVR prompt that will permit the customer to be connected to SBCIS without having to hang up and dial a new number. A non-SBCIS subscriber with a DSL problem who dials 611 from an SBC California telephone line receives an IVR prompt to hang up and call the subscriber's ISP.

6. SBC California does not have a CEI offering or tariff for access to or transfer from 611.

Conclusions of Law

1. Defendants are required to negotiate certain terms and conditions with ISPs; these terms may include advance notice to Raw Bandwidth of DSL Transport disconnection incidental to termination for nonpayment of basic service to an SBC California subscriber.

2. The FCC's Computer III rules govern SBC California's obligations regarding enhanced services.

3. The FCC's Computer III rules do not prohibit the differential treatment of subscribers described in Findings of Fact 3 and 4.

4. DSL Transport is not a basic service under Commission rules and can be disconnected if a subscriber fails to pay basic service charges. DSL Transport is a basic service under the FCC's Computer III rules.

5. The inadvertent transfer of unaffiliated ISPs' subscribers with DSL repair concerns to SBCIS does not raise competitive concerns. Defendants must address subscribers' inquiries before marketing SBCIS DSL service.

6. It is reasonable to make this order effective today in order to provide conduct guidance.

O R D E R

IT IS ORDERED that:

1. The complaint of Raw Bandwidth Communications, Inc. is denied.
2. Defendants shall negotiate terms and conditions of service to Raw Bandwidth, as required by order of the Federal Communications Commission and discussed in the foregoing opinion.
3. The hearing determination is changed. Hearings are not necessary.
4. Case 03-05-023 is closed.

This order is effective today.

Dated _____, at San Francisco, California.